

JUL 28 2000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT

Civil Action No.: 07-2632-D

01-2529D

TONY RODRIGUES
Plaintiff

v.

MASSACHUSETTS CIVIL SERVICE COMMISSION
and the CITY OF BROCKTON
Defendants

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION
FOR JUDGMENT ON THE PLEADINGS**

Tony Rodrigues ("Rodrigues") brought this case pursuant to M.G.L. c. 30A, and M.G.L. c. 31 §44. (A.R. 248) seeking judicial review of a decision of the Massachusetts Civil Service Commission (the "Commission") which dismissed his claim because he was not an aggrieved party and, thus, they had no jurisdiction.

For the following reasons, the plaintiff's motion for judgment on the pleadings is **DENIED** and a final judgment shall issue confirming the decision of the Commission.

FACTUAL BACKGROUND

The following facts are found in the Administrative Record ("A.R."):

On April 28, 2001, the Human Resources Division (the "HRD") of the Civil Service Commission administered an open competitive Civil Services examination to be a Police Officer in the City of Brockton. Rodrigues sat for the exam and indicated that he was fluent in Portuguese. Rodrigues also marked that he was a minority. Rodrigues got a score of 94 on the examination. When the Brockton Police Department sought to appoint

Notice sent
7/20/00
Fjm
Jfo
PCN:jn
JHR
RLQ:jn
AAG
(nd)

RECEIVED
2000 JUL 31 A 11:32
COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

5 new Portuguese speaking officers, the HRD issued a certification list of eligible officers who could be appointed to the position. List 230102 did not contain Rodrigues' name.

Brockton is a consent decree community, which requires the town to make appointments with set guidelines relative to race. Under the consent decree, the HRD must list three non-minority applicants for every minority applicant who is included on a Certification List. This is the procedure that was followed on List 230102. In order to attain the legally required makeup of minority and non-minority candidates, HRD had to include non-minority members on List 230102 with lower test scores than Rodrigues. The lowest minority appearing on the list had a score of 97 on the test, higher than Rodrigues's 94. AR 171.

Rodrigues the fact that appealed his name did not appear on List 230102 and the HRD dismissed his complaint. A Certification List was then requested by the Brockton Police Department for Cape Verdean Creole speaking officers and HRD issued List 240857 which included seven names, five of which indicated that they would accept the appointment. Initially, no candidates were selected off of the first list and the City of Brockton asked for, and was supplied, a list with more candidates. A.R. Only one candidate was selected, Alcides C. Fortes, who was the highest scoring person on List 240857 who was willing to accept the appointment. No one else from List 240857 was hired.

DISCUSSION

Judicial review of the Civil Service Commission's final determinations is governed under General Laws chapter 30A, §14. G.L. c. 31 §2(b). When reviewing an

agency decision, “the court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” G.L. c. 30A, §14(7). This Court may only reverse or modify the Commission’s decision “if it determines that the substantial rights of any party may have been prejudiced because the agency decision is unsupported by substantial evidence, or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.” Id. Substantial evidence as defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” McCarthy v. Contributory Ret. Appeal Bd., 342 Mass. 45, 47 (1961); Cataldo v. Contributory Ret. Appeal Bd., 343 Mass. 312, 314 (1961); G.L. c. 30A, §1(6).

Relief can be granted by the courts if substantial rights have been prejudiced. Here, no relief can be granted. For police department appointments in the City of Brockton, HRD chooses candidates for certification lists on a strict formula whereby three non-minority candidates are included for each minority candidate. There is no discretion in the operation of this formula. The highest scoring candidates who fit into this plan are chosen, with residency only being considered if the candidates have the same score. Residency was not considered in List 230102 or List 240857.

Rodrigues scored a 94 on the 2001 Civil Service Examination. The lowest scoring minority candidate included on List 230102 was 97. Rodrigues’ score was too low, as a minority candidate, to be included on the list using the required formula.

Only one person from List 240857, Alcides C. Fortes, was hired and he was the top scorer on List 240857 who was willing to accept the appointment. Fortes had a higher score than Rodrigues, thus Fortes’ appointment was not a bypass, which would entitled

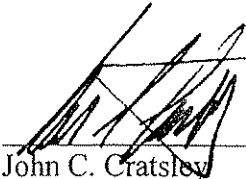
Rodrigues to some relief. A bypass is where one candidate is chosen over another who has the same score.

M.G.L. c. 31 §2(b) provides that the Commission has subject matter jurisdiction for hearing appeals. The Commission has the authority to "hear appeals by a person aggrieved by any decision, action, or failure to act by an administrator." M.G.L. c. 31 §2(b). A person is considered aggrieved if they make allegations that show that their "rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." Id. Here, there is no actual harm to Rodrigues.

Rodrigues was not included on List 230102 because his score was too low, as a minority candidate, to be included on the list. Rodrigues was not chosen from List 240857 because someone with a higher score accepted the position. In my opinion, the Commission correctly found that it does not have subject matter jurisdiction because Rodrigues' substantial rights were not prejudiced. Therefore, I find that the Commission's decision was supported by substantial evidence.

ORDER

For the foregoing reasons it is **ORDERED** that the petitioner's motion for judgment on the pleadings is **DENIED**. The decision of the Commission is ordered **AFFIRMED**.



John C. Cratsley
Justice of the Superior Court

Dated: July 27, 2008


[Home](#)
[My Subscriptions](#)
[Decisions Archive](#)
[Newsclips](#)
[Manage Subscriptions](#)
[My Profile](#)
[Change Password](#)
[Logout](#)

View Decision Archive

Publication Name	Massachusetts Civil Service Reporter (1993-present)
Decision Name	TONY RODRIGUES and JAMES MONTEIRO v. CITY OF BROCKTON

Decision Detail

Current Decisions

TONY RODRIGUES and JAMES MONTEIRO

v.

CITY OF BROCKTON

Docket Nos. G1-04-4, G1-04-5, G1-04-18, G1-05-212 and G1-05-213

May 18, 2007

John J. Guerin, Jr., Commissioner

DECISION ON RESPONDENT'S MOTIONS TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, § 2(b), on November 26, 2003⁽¹⁾, Appellants James Monteiro and Tony Rodrigues (hereafter "Rodrigues", "Monteiro" or "Appellants") appealed the decision of the Respondent, City of Brockton (hereafter "the City" or "Appointing Authority"), claiming error failure to be included on certification list No. 230102 for appointment to the position of Police in the Brockton Police Department. A pre-hearing conference was held on May 14, 2004. On J 2004, the Human Resources Division ("HRD") submitted a Motion to Dismiss for both cases. Appellants submitted Oppositions to the Motions to Dismiss. The Appellants subsequently file appeals claiming bypasses on certification list No. 240857 and a pre-hearing conference was h about August 30, 2005. On April 19, 2006, HRD re-filed its Motion to Dismiss and, on June 1, the City also filed a Motion to Dismiss for both cases. The appeals were subsequently consolid hearing as they related to substantially the same issues. On June 8, 2006, a hearing on the Moti Dismiss regarding all four appeals was held at the offices of the Civil Service Commission. On 30, 2006, the HRD submitted an affidavit from Regina Caggiano, the Assistant Director of HR Service Unit, in order to address questions remaining from the June 8, 2006 hearing. The HRD provided the affidavit to the parties and no comment or opposition to the document was receive the Appellants.

Factual Background

On April 28, 2001, HRD administered an open competitive Civil Service examination for indiv interested in working as police officers in municipal service in the City of Brockton. On the da examination, applicants were instructed to indicate on the examination answer sheet any langu: they spoke fluently. HRD enters this information into its computerized data base to create an I Eligibility Record for each applicant taking the examination. The field for language fluency is Special Qualifications ("Spec-Qual"). Appellant Monteiro, a minority, sat for the April 2001

examination for police officer, did not indicate he was fluent in any non-English language and a score of 94. Appellant **Rodrigues**, a minority, also sat for the April 2001 examination but indicated that he was fluent in Portuguese. Appellant **Rodrigues** also received a score of 94. Both Appellants are City residents.

In February, 2003, in response to a request by the City for a special certification for candidates in Portuguese, HRD issued certification list No. 230102 for five permanent full time Portuguese speaking police officers. Only candidates indicating fluency in Portuguese at the April 2001 examination under the Spec-Qual field were considered for this certification list. The Appointing Authority made three appointments from the list: two non-minorities, one a resident and one a non-resident, with scores higher than the Appellants on the examination, and the third a non-minority resident with a score of 75. Neither Appellant was included on the certification list.

On April 26, 2003, HRD administered another open competitive civil service examination for individuals interested in working as police officers in the City of Brockton. On this examination, Monteiro indicated fluency in FHGS (French, Haitian Creole, Portuguese and Spanish) and Rodrigues in GO (Portuguese and "Other").⁽²⁾ On August 2, 2004, a certification list was requested by the City for three permanent full time bilingual police officers. The City also submitted a Request for Bilingual Selective Certification, stating that Cape Verdean Creole was the language in which proficiency was required, as, "The City has a Capeverdean population of over 17,000." Based on the April 2003 examination, HRD issued a certification list, No. 240857 dated October 4, 2004 that included names. Five of those individuals signed that they would accept appointment. Monteiro was listed on the list as one of the candidates who indicated he would accept appointment. No selection was made off this first list, as the City contacted HRD on October 27, 2004 to request a larger list. The second expanded list issued had the same certification number as the first list and was dated October 2, 2004. It included all candidates on the eligible list who declared on the April 2003 exam that they either spoke another language or specifically identified the language they spoke. The Interview Notice Postcard sent to applicants to indicate to them the language which the Appointing Authority had requisitioned stated: "Must be Proficient in Cape Verdean Creole." **Rodrigues** was listed 19th on the second certification list and Monteiro was 22. The City selected only one candidate from this list. Bypass letters were sent to the Appellants.

Respondent's Grounds for Dismissal

The City was a Consent Decree community at the times the Appointing Authority requested the certification lists referred to above. This means that any certification list issued, including special certifications for language fluency, must follow the order dictated by the consent decree.⁽³⁾ HRD is the primary state overseer of the implementation of the consent decree. In response to a requisition from the Appointing Authority subject to the consent decree, HRD is obligated to deliver a list of eligible candidates for appointment arranged in a particular order specified by the decree and the City is required to follow the list issued. For the City of Brockton, the consent decree requires that minority and non-minority candidates are certified in the following ratios: one minority name is followed by three non-minority names. In the first instance, when HRD issued certification list No. 230102 in accordance with the consent decree order, several non-minority, non-residents with lower examination scores appeared on the list whereas minority residents with relatively higher scores were not included. A large number of minorities indicated fluency in Portuguese and fewer non-minorities indicated fluency. Specifically, the last minority to appear on the certification list received a score of 97 on the civil service examination. Appellants' score of 94 on the April 2001 examination was not high enough to be included on the list.

Appellant Monteiro argues that the omission of his name from the first certification list deprived him of the opportunity of being considered by the Appointing Authority for appointment to one of the permanent full-time Portuguese speaking police officer positions. In his affidavit, Monteiro argues that he completed the paperwork at the April 2001 examination site relative to his status as a Portuguese speaker and should have been included on the certification list. The Respondent asserts that Monteiro indicated on his April 2001 examination answer sheet that he was a minority but did not indicate fluency in any language. It argues that Monteiro was not included on certification list #230102 because he had not indicated fluency in Portuguese on his civil service examination sheet. The Respondent further claims that even if Monteiro had indicated fluency in Portuguese, his name still would not have been included on the certification list because of the manner by which the list was required to be

constructed in accordance with the consent decree.

The Respondent's arguments are persuasive. Evidence shows that Monteiro did not indicate flu any language on the April 2001 examination answer sheet and therefore was not included on certification list No. 230102. **Rodrigues** argues that certification list #230102 only contained the names of six candidates who are Portuguese speaking and residents of the City but should have contained eleven names. His argument is also not meritorious in light of the Respondent's explanation of the list's construction. Further, the Appellants assert that their names appear on the certification list as No. 100, tied with twenty other individuals, and that their ranking is higher than five of the individuals whose name appeared on certification list No. 230102 and higher than one of the ten candidates appointed. This argument also fails in light of the above discussion of the consent decree's impact on the order of inclusion on the certification lists.

With regard to appointments from the second certification list No. 240857, dated October 27, 2004, the City selected only one candidate. Evidence showed that the City's August 2, 2004 requisition called for candidates that were proficient in Cape Verdean Creole. Applicants included Haitian Creole speakers as well as those applicants who indicated "Other", thus also culling applicants who spoke Cape Verdean Creole. The one candidate hired by the City had a higher ranking on the list than either Appellant. Evidence supports the Respondent's contention that the bypass letter from the City to the Appellants was sent in error as no individual ranked lower than the Appellants was selected, thus there existed no bypass. Further, the City contends it only hired one candidate as it was dissatisfied with others. The City was not bound to appoint three candidates from the certification list and its decision so does not create justification for a bypass appeal.

The Appellants also argue that their residency status should have placed their names on the list as any non-resident. However, based on the consent decree, residency preference helps a candidate's ranking within his particular sub-group (minority or non-minority) but does not give him any preference over non-residents from the other sub-group.

In sum, a review of the evidence indicates that the construction of the certification lists by HRI pursuant to the requirements of the consent decree, is the reason Appellants **Rodrigues** and **Monteiro** were not included on these lists for consideration for appointment to permanent full-time police officers.

Based on the above, the Appellants were not bypassed and thus, are not persons aggrieved under the provisions of § 2(b). The Commission, therefore, lacks jurisdiction in this matter.

Conclusion

The Respondent's Motions to Dismiss are allowed and the Appellants' appeals filed under Doc# G1-04-4, G1-04-5, G1-04-18, G1-05-212 and G1-05-213 are hereby *dismissed*.

* * *

By vote of the Civil Service Commission (Bowman, Taylor, Guerin and Marquis, Commission President)
May 17, 2007.

Notice to:

Frank J. McGee, Esq.
1952 Ocean Street
Marshfield, MA 02050-3424

James McCormack, Esq.
Assistant City Solicitor
City of Brockton Law Department
45 School Street
Brockton, MA 02301

Patrick Mulroney, Esq.
Commonwealth of Massachusetts
Human Resources Division
One Ashburton Place
Boston, MA 02108

1. The record of these matters reveals that Appellant Monteiro filed an appeal on November 26 which was assigned Docket No. G1-04-4 and filed the same appeal on December 1, 2003 which assigned Docket No. G1-04-5. The appeals are identical and there is no apparent reason why it is so.

2. "Other" indicates any language that a candidate is fluent in that is not formally represented by other selections.

3. The Consent Decree is the result of an agreement in *Castro v. Beecher*, 365 F. Supp. 655 (D.Mass.1973) that established a system of hiring police officers intended to increase the number of minority police officers. In 1975, the Court clarified an aspect of *Castro v. Beecher*, 386 F. Supp. 655 (D. Mass. 1975) entering a decree "ordering the Civil Service Commission to certify candidate basis of the priorities established by the Consent Decree and to give effect to Massachusetts state preferences, including.....residency preference, only within each of the Groups." *Id.* At 1285. The Appellants are not challenging HRD's continued application of the consent decree to the City.

Back

© 2008 Landlaw, Inc. All rights reserved. phone:800-637-6330 email:info@landlaw.com